SENIOR COUNSEL
C. D. MICHEL*

SPECIAL COUNSEL
JOSHUA R. DALE
W. LEE SMITH

ASSOCIATES
ANNA M. BARVIR
MICHELLE BIGLARIAN
SEAN A. BRADY
SCOTT M. FRANKLIN
BEN A. MACHIDA
THOMAS E. MACIEJEWSKI
CLINT B. MONFORT
JOSEPH A. SILVOSO, III
LOS ANGELES, CA

* ALSO ADMITTED IN TEXAS AND THE DISTRICT OF COLUMBIA

MICHEL & ASSOCIATES, P.C.
Attorneys at Law

OF COUNSEL
DON B. KATES
BATTLEGROUND, WA

RUTH P. HARING
MATTHEW M. HORECZKO
LOS ANGELES, CA

WRITER'S DIRECT CONTACT:
562-216-4444
CMICHEL@MICHELLAWYERS.COM

April 8, 2015

Sheriff-Coroner Sandra Hutchens
County of Orange
550 N. Flower Street
P.O. Box 449
Santa Ana, CA 92703

Orange County Sheriff's Department
CCW Licensing Unit
320 N. Flower Street, 4th Floor
Santa Ana, CA 927003
Fax: (714) 834-5605
Email: ccwpermits@ocsd.org

Re: CCW "Good Cause" Requirements

Sheriff Hutchens:

We write on behalf of our clients, the National Rifle Association ("NRA"), the California Rifle and Pistol Association ("CRPA"), and their hundreds of thousands of members throughout California, in response to your recent article in the Orange County Register on April 5 explaining your decision to revert to a restrictive "good cause" standard for the issuance of CCWs to inform you that no law requires you to do so and that applying such standard to certain pending applicants is illegal.

Referencing the Ninth Circuit Court of Appeals' recent order to rehear the *Peruta v. San Diego County* matter before an en banc panel, you updated your CCW information page to say:

> New applicants, and those applicants currently in process, will be required to articulate their safety concerns and provide supporting documentation in accordance with the Orange County Sheriff's Department's (OCSD) Policy 218.

In doing so, you suggest that the Ninth Circuit's action in *Peruta* legally compels you to revert to Policy 218, which sets a high standard for "good cause" that few applicants can likely meet. The article you subsequently authored confirmed that is your position, stating: "A recent court decision has ***required*** a revision to the Sheriff Department's Carry Concealed Weapon policy" because prior to *Peruta* the "good cause" standard "required applicants to articulate their safety reasons for carrying a concealed weapon." This is the same position you took when you first became Sheriff in your article, *It's Simple, It's The Law* (Oct. 10, 2008), after you revoked scores of already issued CCWs.

But that is not the law. Nothing the federal court said requires—or even could require—sheriffs to adopt a "good cause" policy mandating that CCW applicants show more than a desire for general self-defense. California law does not require sheriffs to do so either. To the extent you continue to rely on Attorney General Opinion No. C.R. 77/30 I.L., an opinion from 1977, as saying otherwise, such interpretation is as erroneous today as it was years ago when you first adopted a strict "good cause" policy based on it. Nothing in the Attorney General's Opinion compels sheriffs to adopt any particular

policy, and to the extent it does, it is in conflict with the numerous appellate court decisions that have unanimously held that California Sheriffs have *extremely* wide discretion in establishing a "good cause" standard, whether it be a strict or liberal one. If your position were correct, many California police chiefs and sheriffs regularly break the law by issuing CCWs beyond their legally authorized discretion, which would not be as broad as they currently believe it to be. Their counsel obviously does not agree with your position.

Because you are relying on a demonstrably erroneous legal premise for reverting back to Policy 218, should you continue to rely on strict "good cause" standard following receipt of this correspondence, it will be clear that such is merely your policy preference. Respectfully, you should admit such is the case so that your constituents know where you truly stand on this very important issue. For you can no longer stand behind the cloak of an illusory legal mandate. If you are relying on some other legal analysis for why you believe you are required to adopt Policy 218, we respectfully ask that you make it open to public scrutiny.

In any event, while you are free to adopt a strict "good cause" standard if that is indeed your policy preference—setting aside its unconstitutionality—you are not so free to impose it on applicants who have already been approved for and commenced CCW training under your former policy. As explained below, Senate Bill 610 (2011), which NRA and CRPA sponsored and supported, prohibits a change in the "good cause" standard applicable to an applicant once that person has been directed to start training. Cal. Penal Code § 26165(d). Indeed, that one of the main purposes of SB 610 was to prevent applicants from having to pay for costly training before knowing whether they would be deemed to have "good cause." Accordingly, you ***legally cannot*** reevaluate the "good cause" of any applicant who has been directed to commence training. To the extent you are doing so, you are breaking the law and should cease doing so immediately to avoid the legal consequences.

Below is a thorough legal analysis supporting each of these conclusions. If you or your counsel have any questions or concerns, please feel free to contact our office.

LEGAL ANALYSIS

I. The 1977 Attorney General Opinion Does Not Require a Sheriff to Adopt Any Particular "Good Cause" Standard

Attorney General Opinion No. CR 77/30 I.L. does not limit a sheriff's discretion in establishing a "good cause" standard to only the standards set forth therein. It sets out guidance for issuing authorities, not mandates. Indeed, this is reflected by the following sentence of the Opinion:

> In evaluating good cause, the issuing authority *may* first of all consider various *factors* associated with the individual applicant.

First, it says the issuing authority *may* consider the standards mentioned therein, which indicates a suggestion rather than a requirement. Second, it uses the word "factors," which in legal analysis is primarily used for non-essential standards rather than requirements, which is usually associated with the word "element." *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 944-45 (1st Cir. 1995). This is not the language of a mandatory regime, but rather a potential framework.

In 2008, the last time the issue arose, your legal counsel seemed to focus entirely on the following statement in the Attorney General Opinion to support your position:

> The issuing authority must determine whether the threat to the applicant (or other causal situation) is as real as the applicant asserts (e.g., is *there clear and present danger* to the applicant, his spouse, his family, or his employees).

First, with the language: "or other causal situation," this provision expressly contemplates additional circumstances that would rise to the level of "good cause" for CCW issuance.

Additionally, the Attorney General Opinion states that the Sheriff's discretion is "very broad, *particularly* with respect to activities of harmful propensities . . .." (Citing 9 McQuillan, Municipal Corporations 158 (3d revised ed.) and *Iscoff v. Police Comm'n*, 22 Cal. App. 2d 395, 402 (1963)). Again, the word "particularly" denotes that the Sheriff's discretion is not exclusively limited to such activities; rather, it is open to other "good causes."

Finally, the Attorney General Opinion provides as an example of what could be accepted as "good cause" a person who "required the firearm merely to protect the delivery or deposit of funds in a bank on certain occasions." That clearly would not meet the standard set out in the above paragraph since there is neither a "clear" nor a "present" danger. Rather, that example contains only an anticipated fear of safety that is logically derived from the stated circumstances. The Attorney General Opinion could not have been saying one is required to have a certain "good cause" in one paragraph and then provide an example of someone who may have "good cause" that does not meet that standard paragraphs later, as your interpretation would require.

The Attorney General Opinion simply does not say what you think it does. Frankly, it is difficult to say what the Opinion stands for at all. But it definitely does not set out a baseline for "good cause." Indeed, in seeking to be dismissed from a lawsuit by CCW applicants who were attacking a Sheriff's "good cause" standard, the AG's office argued that "Applicants cannot allege or prove any set of facts that would entitle them to the requested relief against the Attorney General because the Statute does not confer upon him authority to grant or deny CCW ***or to control County defendants' [i.e., Sheriff's] authority in that regard***." Memorandum of Points and Authorities in Support of Attorney General Edmund G. Brown Jr.'s Motion to Dismiss at 2, *Rothery v. Blanas*, No. 208-CV-02064 (E.D. Cal. 2009), 2009 WL 1473822.

II. The Attorney General Opinion Is Not Controlling Law

Even assuming the Attorney General Opinion is intended to require issuing authorities to adopt a strict "good cause" standard, you are not bound by the Opinion. In fact, though entitled to great respect, "an official interpretation of a statute by the Attorney General is not controlling." *Thorning v. Hollister School Dist.*, 11 Cal. App. 4th 1598, 1604 (1992). Appellate court opinions, however, are controlling. And in the nearly 95 years that the state has authorized CCW licensing, every case discussing "good cause" has made it clear that sheriffs are essentially unrestrained in establishing a "good cause" standard:

> Section 26150 gives "extremely broad discretion" to the sheriff concerning the issuance of concealed weapons licenses (*Nichols v. County of Santa Clara* (1990) 223 Cal.App.3d 1236, 1241 [273 Cal.Rptr.84]) and "explicitly grants discretion to the issuing officer to issue or not issue a license to the applicants meeting the minimum statutory requirements." (*Erdelyi v. O'Brien* (9th Cir. 1982) 680 F.2d 61, 63.)

Gifford v. City of Los Angeles, 88 Cal. App. 4th 801, 805 (2001); *see also CBS, Inc. v. Block*, 42 Cal.3d 646, 655 (1986) (referring to Sheriff's discretion in issuing CCWs as "unfettered").

So even if the Opinion intends to limit sheriffs' discretion in establishing a "good cause" standard, all the *subsequent* case law has held otherwise. Those cases confirm that sheriffs have "unfettered" discretion to decide what "good cause" standard to use—whether that be the relaxed one previously mandated by the *Peruta* opinion or a strict one like Policy 218. These unequivocal court cases, suggesting that sheriffs are free to issue CCWs for general self-defense, should guide your legal analysis here—not a vague 38-year-old opinion from the Attorney General that was not even referenced by those cases and which subsequent Attorneys General have abandoned as noted above.

You are therefore not legally required to adopt Policy 218's strict "good cause" standard and should either maintain the policy you have had over the past year or admit that you prefer strict CCW issuance.

III. Penal Code Section 26165(d) Prohibits Requiring an Applicant to Submit to a "Good Cause" Determination After Being Approved for a CCW Training Course

SB 610 requires issuing authorities to publish an official written policy explaining, among other things, the specific circumstances under which they consider an applicant to have "good cause." Cal. Penal Code § 26160. Once a CCW application is submitted, SB 610 also requires issuing authorities to provide an applicant with written notice of their determination of whether the applicant qualifies under that published "good cause" policy. Cal. Penal Code § 26202. "If the licensing authority determines that good cause exists, the notice shall inform the applicant to proceed with the training requirements specified in Section 26165." Cal. Penal Code § 26202. SB 610 further amended the law to now expressly prohibit issuing authorities from requiring an applicant to pay for any mandatory CCW training course before the sheriff makes a determination that the applicant meets the standard *set out in the written policy*. Cal. Penal Code § 26165(d).

You have publicly stated that "those applicants currently in process, will be required to articulate their safety concerns and provide supporting documentation in accordance with the Orange County Sheriff's Department's (OCSD) Policy 218." It has come to our attention through various sources that OCSD is including those applicants who have already commenced or paid for CCW training among those who will be subjected to Policy 218's new "good cause" standard. Indeed, an applicant was quoted in the Orange County Register as saying she is days away from receiving her CCW but is being required to further support her "good cause" under the new standard. To the extent you are requiring such, you are in blatant violation of Penal Code section 26165(d).

CONCLUSION

Based on the foregoing, we respectfully request that you maintain the same policy that OCSD has had in place over the last year, recognizing self-defense as sufficient "good cause" for a CCW, as you have no legal impediment to doing so. To the extent you are not going to return to that policy, we ask that you issue a statement either laying out your legal position or admitting that Policy 218 reflects your policy preference for CCW issuance. Finally, regardless of what policy you intend to adhere to

going forward, you ***must*** cease subjecting applicants who have commenced CCW training from Policy 218's strict "good cause" standard, because doing so is illegal.

Sincerely,
MICHEL & ASSOCIATES, P.C.

Sean A. Brady
on behalf of C. D. Michel

CDM/sb

cc: James Havey, Esq., Orange County County Counsel
James.Harvey@coco.ocgov.com, Fax: (714) 834-2770

Todd Spitzer, Chairman of Orange County Board of Supervisors
Todd.Spitzer@ocgov.com, Fax: (714) 834-2786

Lisa A. Bartlett, Vice Chair of Orange County Board of Supervisors
Lisa.Bartlett@ocgov.com, Fax: (714) 834-2670

Andrew Do, Member of Orange County Board of Supervisors
first.district@ocgov.com, Fax: (714) 834-5754

Michelle Steel, Member of Orange County Board of Supervisors
Michelle.Steel@ocgov.com, Fax: (714) 834-6109

Shawn Nelson, Member of Orange County Board of Supervisors
Audra.Fishel@ocgov.com, Fax: (714) 834-2045